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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANGELA F., a Minor, etc., et al. Plaintiffs and Appellants, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B167888 (Super. Ct. No. LC 056093)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen D. Petersen, Judge. Affirmed.

Law Offices of David Craig Bernstein and David Craig Bernstein for Minor and Plaintiff and Appellant Marja F.

Collins, Collins, Muir & Stewart, John J. Collins and Douglas Fee for Defendants and Respondents County of Los Angeles, Department of Child and Family Services and Rebecca McCauley.

The jury returned a defense verdict on plaintiffs' complaint for false imprisonment, battery, and violation of civil rights (42 U.S.C. § 1983; hereinafter section 1983)[1] against defendants County of Los Angeles (the county) and Rebecca McCauley, a social worker for the county's Department of Children and Family Services (the department). The jury rejected plaintiffs' allegations that McCauley, during a child abuse investigation, had unlawfully detained them against their will, had used physical force and unreasonable duress, and had violated their Fourth Amendment right to be free from unreasonable seizures and excessive force.

On appeal, plaintiffs do not challenge the jury's adverse finding on the battery allegation. Plaintiffs dispute only the defense verdicts on the false imprisonment and section 1983 claims, claiming there were instructional errors. We reject plaintiffs' contentions and affirm the judgment.

BACKGROUND

On May 4, 2000, McCauley responded to a suspected child abuse report made by a Canoga Park Lutheran School (school) employee regarding 14-year-old Ashley F.[2] Ashley and her twin brother, Christopher F., are the step-children of plaintiff Marja F., and the step-siblings of plaintiff Angela F. (who was then 11 months old). At that time, Ashley and Christopher were alternating between living one week with their father Todd F. (along with Todd's wife Marja and daughter Angela), and the next week with their mother Deborah F., Todd's former wife.

On the evening of May 3, Marja and Ashley had an argument which resulted in Ashley running away from Todd's house and spending the night at Deborah's house. On May 4, the school learned that, according to Ashley, Marja had allegedly pushed Ashley

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1 Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

2 Canoga Park Lutheran School and two of its employees, Janet Just and Rita Boyle, were originally named as defendants in the complaint. They were dismissed from the action during trial due to a settlement agreement. They are not parties to this appeal.

against a dresser the previous night. The school also learned that Ashley did not want to go back to Todd's house after school on May 4, but that Deborah was reluctant to violate the custody order by letting Ashley remain at her house during Todd's week of custody.

The school phoned Marja on May 4 and informed her that Ashley had accused Marja of pushing Ashley into a dresser, but that Ashley wanted Marja to pick her up from school. In response to the school's request that Marja arrive early to pick up Ashley from the school office, Marja went to the school office.

Once Marja arrived at the school, a school employee told Marja that someone from the department would be coming to investigate Ashley's allegation of child abuse. (Originally, plaintiffs' complaint had included allegations of battery and false imprisonment against the school and its employees. As the school defendants were dismissed upon a settlement during trial, we will not discuss those allegations.)

When McCauley arrived at the school, she spoke with Marja (with Angela in her arms) in a school office for about 30 minutes. At the end of their conversation, Marja (still holding Angela) stood up and went home without Christopher and Ashley.

Christopher and Ashley (who was found to have no physical marks on her body), went home with Deborah. McCauley, who never detained Ashley or filed a dependency petition on Ashley's behalf, reported to the department that the abuse allegation was "inconclusive." Due to a subsequent family court order, Deborah now has sole physical custody of both Christopher and Ashley.

Marja and Angela filed the present lawsuit against the county and McCauley for false imprisonment and violation of section 1983. By means of an amendment during trial, plaintiffs added the county and McCauley as defendants in the battery claim (which originally was alleged only against the dismissed school defendants).

At trial, much of what occurred during the May 4 investigation was hotly disputed by both sides. It was undisputed, however, that Marja had told McCauley that she did not wish to speak to McCauley on May 4. Two eyewitnesses testified, without contradiction,

that on May 4, McCauley had told Marja that if she would not speak with McCauley at the school, they would have their conversation at the police station or at the department.[3]

The parties disagreed about virtually everything else that allegedly happened on May 4.

According to Marja, on May 4, McCauley had grabbed Marja by the arm, pushed Marja into an office, threatened Marja with arrest and the removal of her baby Angela (with regard to whom there was no allegation of abuse), denied Marja's repeated requests to speak with an attorney, belittled Marja, refused to give Marja a chance to explain her side of the story, twisted Marja's wrist in order to remove a telephone from Marja's hand, and grabbed and tugged on the screaming and crying baby Angela (allegedly causing bruises over Angela's body). Marja stated in her opening brief that when she finally got up to leave the office on May 4, she told McCauley: "'If you want to arrest me, you're going to have to arrest me, but I can't stay here anymore. I'm taking my baby and I'm going home.' . . . As Marja walked away, Ms. McCauley said 'You can go, but I'm not done with you. I can come at any time in the middle of the night with the police, and arrest you, along with your husband, and take your baby away.' . . ."

The defense theory, on the other hand, was that Marja, who had previously been diagnosed by her therapist Audrey Stern with post-traumatic stress disorder, was not a credible witness. According to Stern, due to repeated traumas which Marja had experienced well before May 4 (including Marja's difficult and dangerous childhood in a war-torn country, her marriage to a physically abusive former spouse, her loss of a pregnancy as a result of a car accident, and her brother-in-law's recent suicide), Marja suffers from post-traumatic stress disorder. Stern testified that after Marja gave birth to Angela in 1999, Marja "has become hypervigilant, won't trust anybody with the baby, won't let anyone, even in the family, touch her." Stern testified that the events of May 4 could have aggravated Marja's preexisting stress disorder.

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[3] McCauley testified that she could not recall making the statement attributed to her by the two eyewitnesses.

The defense psychiatric expert, Dr. Irving Gislason, confirmed that, in his opinion, Marja had suffered an "acute stress reaction" when she was confronted with Ashley's child abuse allegation on May 4. Marja's "emotional situation" manifested itself at school on May 4, according to Dr. Gislason, in the same "way it was described as manifesting itself in 1999, at the time of the death of her brother-in-law[.] Dr. May mentioned she was hypervigilant, not trusting anyone, paranoid, having nightmares. She was angry and resentful, basically, overwhelmed with a lot of stress at that time. Again, at the school incident, I would argue that she had many of the symptoms of acute stress reaction, including the ones just mentioned, plus, you know, feelings of detachment, feelings of being in a daze, not feeling she's really the person she is, having difficulty with her orientation. And they mention in the diagnosis an inability to recall important details of a traumatic situation. [¶] So it would be my opinion that when she went there, she had been stressed before. She has a lot of stressors in her life, ongoing, and she was, basically, feeling very much alone and highly stressed. And I believe she went into an acute stress reaction."

The defense did *not* propose that McCauley, had she behaved and issued threats in the improper manner described by Marja, was privileged by her official position to act and make threats in that fashion. On the contrary, according to Donna Buckley, McCauley's supervisor, those allegations, if true, would have violated departmental policy.

In her own defense, McCauley testified that she did not strike or grab either plaintiff. Dr. Gislason testified that in his opinion, Marja could have inadvertently caused the bruises on baby Angela's body by gripping the baby too tightly during the stressful May 4 investigation.

Regarding the allegation that McCauley had threatened to remove baby Angela (who was not the subject of any abuse allegation), McCauley testified: "What I told her [Marja] was, I could not tell who was telling the truth, whether it was Ashley or Marja. Marja denied abusing her children. And I said, 'Then you've got no problems if you're not abusing your [step]children. But if you are abusing the stepchildren, you potentially

run the risk of losing your own child [Angela], if you are abusing [Ashley] and continue to abuse your stepchildren."

With the exception of Marja, eyewitnesses described McCauley as being calm and professional in her demeanor and tone while speaking with Marja. One witness stated that when McCauley did raise her voice, she did so to be heard over Marja's raised voice. No one else (other than Marja) heard or saw baby Angela crying, or saw a woman with an ear-microphone piece blocking Marja's path from the school.

The jury, by votes of 11 to 1, determined that McCauley did not commit a battery on either Marja or Angela. Plaintiffs raise no challenge to the jury's verdict on this issue.

By votes of 10-2 as to Marja and 9-3 as to Angela, the jury found there was no false imprisonment.

With regard to the civil rights violation claim, the jury, by votes of 10-2 as to Marja and 11-1 as to Angela, found there was no violation.

DISCUSSION

Plaintiffs contend the trial court erred in instructing the jury on the claims of false imprisonment and violation of section 1983.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. [Citations.]" (*Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

To obtain a reversal due to instructional errors, plaintiffs must establish that the alleged errors were prejudicial. "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule* v. *General Motors Corp., supra,* 8 Cal.4th at p. 580.) "[W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the

jury itself that it was misled." (*Id*. at pp. 580-581, fn. omitted.) "Instructional error ordinarily is considered prejudicial only when it appears probable that the improper instruction misled the jury and affected the verdict. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 . . . .)" (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.)

A. False Imprisonment Instruction

The jury was instructed that false imprisonment could be accomplished by either actual force or threat of force, as well as by "menace, fraud or deceit, or unreasonable duress[.]"[4] The court informed the jury that unreasonable duress "*includes but is not limited to* a threat to use physical force, or a threat to inflict harm upon a member of the plaintiff's immediate family, or harm to plaintiff's property, but does not include an appeal to plaintiff's conscience. . . ." (Italics added.)

Contrary to plaintiffs' contention, the jury was not told that a finding of duress must be based on a threat of physical force. While a threat of physical force was included within the definition of duress, the definition was *not* limited to the threat to use physical force. According to the instruction, any unreasonable duress used to restrain, detain or confine would constitute a false imprisonment. Accordingly, nothing precluded the jury from finding there was a false imprisonment based on threats *other* than the threat of physical force. Had the jury credited, for example, Marja's testimony about the purported threats to remove Angela from Marja's custody or to arrest Marja, the instructions would have permitted the jury to find there was a false imprisonment. Accordingly, we reject plaintiffs' contention of instructional error with regard to the false imprisonment allegation.

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4 The false imprisonment instruction stated: "The plaintiffs . . . seek to recover damages based upon a claim of false imprisonment. [¶] The essential elements of a claim of false imprisonment are: [¶] 1. The defendant intentionally and unlawfully exercised force or the express or implied threat of force, menace, fraud or deceit, or *unreasonable duress* to restrain, detain or confine the plaintiff; [¶] 2. The restraint, detention or confinement compelled the plaintiff to stay or go somewhere for some appreciable time, however short; [¶] 3. The plaintiff did not consent to the restraint, detention or confinement; and [¶] 4. The restraint, detention or confinement caused plaintiff to suffer injury, damage, loss or harm. [¶] *'Unreasonable duress' includes but is not limited to a threat to use physical force, or a threat to inflict harm upon a member of the plaintiff's immediate family, or harm to plaintiff's property, but does not include an appeal to plaintiff's conscience. . . .*" (Italics added.)

B. Section 1983 Instruction

The trial court refused to give three proposed instructions regarding the section 1983 claim.[5]

Plaintiff contends the section 1983 instruction that was given by the trial court erroneously equated that claim with the false imprisonment claim. The 1983 instruction stated: "The plaintiffs . . . also seek to recover damages based upon a claim of violation of their civil rights, in violation of their Constitutional right not to be denied or deprived of their liberty without due process of law. [¶] The essential elements of this claim in this case are as follows. [¶] 1. Ms. McCauley knowingly restrained, detained, or confined the plaintiff; [¶] 2. The restraint, detention or confinement compelled the plaintiff to stay or go somewhere for some appreciable time, however, short; [¶] 3. The plaintiff did not consent to the restraint, detention or confinement, and reasonably believed that she was not free to leave because of the conduct of Ms. McCauley; [¶] 4. The restraint, detention or confinement caused plaintiff to suffer injury, damage, loss or harm." [6]

1. Unreasonable Seizure

With regard to the unreasonable seizure aspect of plaintiffs' section 1983 claim, plaintiffs contend the court "failed to instruct the jury as to the necessary elements of an unreasonable seizure claim under section 1983."

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5 The trial court refused to give the following instructions:

"On the plaintiffs' violation of civil rights claim, the plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence: [¶] 1. The acts or omissions of the defendant were intentional; [¶] 2. The defendant acted under color of law; and [¶] 3. The acts or omissions of the defendant were the cause of the deprivation of the plaintiff's rights protected by the Constitution or laws of the United States. [¶] If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant."

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest."

"A County of Los Angeles social worker investigating a claim of child abuse may not seize children suspected of being abused or neglected without a prior court order unless reasonable avenues of investigation are first pursued."

6 Given our determination that plaintiffs are incapable of showing prejudice, we need not decide whether the instruction was erroneous.

"A seizure violates the Fourth Amendment if it is objectively unreasonable under the circumstances. *See Santos v. Gates,* 287 F.3d 846, 853 (9th Cir.2002)." (*Doe ex rel. Doe v. Hawaii Dept. of Educ.* (9th Cir. 2003) 334 F.3d 906, 909.) "'Seizure' alone is not enough for [section] 1983 liability; the seizure must be 'unreasonable.'" (*Bower v. County of Inyo* (1989) 489 U.S. 593, 599.)

Plaintiffs contend the court failed to instruct the jury to examine the objective reasonableness of McCauley's alleged conduct and speech with regard to the unreasonable seizure allegation. The jury, however, necessarily examined the reasonableness of McCauley's alleged conduct and speech when it determined there was no false imprisonment. As we stated above, the jury was instructed that "unreasonable duress" is not limited to threats of physical force. Had the jury believed Marja's testimony about the purported threats to remove Angela from Marja's custody or to arrest Marja, the jury was free to find there was a false imprisonment.

Significantly, the defense never disputed that if McCauley had made the threats or conducted herself in the manner described by Marja, McCauley would have violated departmental policy. In other words, Marja's credibility, as opposed to the reasonableness of McCauley's alleged threats and behavior, was the issue on which the case turned.

Accordingly, we see no probability that, in the absence of the alleged instructional error, the jury would have reached a different result on the unreasonable seizure allegation. The fact that the jury requested a read back of the testimony of Marja and McCauley after about three and a half hours of deliberation, and informed the court that it was deadlocked on the false imprisonment and section 1983 claims after another two hours of deliberation, does not compel a different result. Ultimately, the jury reached a verdict only an hour and a half later (after a total of seven hours of deliberation), showing that the jury did not have significant difficulty in reaching a verdict in a trial with 12 plaintiffs' witnesses and 4 defense witnesses, and over 1,000 pages of reporter's transcript.

2. Excessive Force

"Federal civil rights claims of excessive force are the federal counterpart to state battery and wrongful death claims; in both, the plaintiff must prove the unreasonableness of the officer's conduct. [Citations.]" (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102, fn. 6.)

Plaintiffs contend "the trial court offered no instructions relating to a section 1983 claim for excessive force under the Fourth Amendment. As such, the jury had no opportunity to make an independent determination regarding the County's liability for this separate cause of action. While the battery and excessive force claims were based on similar facts, they are independently viable and Marja and Angela were entitled to jury instructions which set forth the (different) elements of each claim. The absence of excessive force instructions essentially denied Marja and Angela . . . the opportunity to present their full case to the jury. . . ."

While Marja's testimony, if believed, would support a finding of excessive force, the jury necessarily rejected her testimony on that point when it concluded that no battery had occurred. Although it is true that a finding of excessive force does not necessarily require actual physical contact (see, e.g., *McDonald v. Haskins* (7th Cir. 1992) 966 F.2d 292 [pointing a gun at a young child in a crib constituted excessive force during a warrantless search of a dwelling]), plaintiffs fail to explain what evidence in this case would support a finding of excessive force without actual contact. Based on our review of the record, plaintiffs' theory was that McCauley used excessive force with actual physical contact, and not that she used excessive force without actual contact.

On this record, plaintiffs are incapable of showing it is probable that in the absence of the alleged instructional error, a different verdict would result.

3. Affirmative Defense

The jury received an affirmative defense instruction which plaintiffs contend erroneously focused on McCauley's subjective belief regarding Marja's state of mind, rather than the objective reasonableness of McCauley's speech and conduct. The affirmative defense instruction stated: "However, if Ms. McCauley reasonably believed

that [Marja] believed that she *was* free to leave, then Ms. McCauley is entitled to a finding of no liability on the civil rights claim. Ms. McCauley has the burden of proof on this issue."

Again, given that McCauley's supervisor testified that if McCauley had issued threats and behaved in the manner described by Marja, McCauley would have violated departmental policy, there was no danger that the jury was misled to believe that McCauley's purported statements and actions, if true, were reasonable. The jury's rejection of Marja's testimony, as conclusively demonstrated by the defense verdict on the battery claim, convinces us that any alleged error in the affirmative defense instruction could not have been prejudicial.

ATTORNEY FEES

Defendants, having recovered $2,000 in statutory attorney fees below as the prevailing party on the section 1983 claim against the county, seek statutory attorney fees on appeal. (42 U.S.C. § 1988(b); hereinafter section 1988(b).)[7] In addition, defendants seek attorney fees as sanctions for a frivolous appeal under *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*).

The standard for awarding fees under section 1988(b) is the same as under *Flaherty*. (*Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 14.) "The United States Supreme Court has held that a defendant who prevails in an action under . . . section 1983 may be awarded attorney's fees under . . . section 1988 only when the plaintiff's action was frivolous or vexatious." (*Id.* at p. 13.) "'[A]ssessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable,

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[7] "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." (§ 1988(b).)

or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.' [Citations.]" (*Id.* at pp. 14 -15.)

In ruling on defendants' attorney fee motion below, the trial court refused to award defendants any fees for McCauley's defense, finding that the action against McCauley was not frivolous.

Other than plaintiffs' failure to prevail, we conclude the requirements for awarding attorney fees under section 1988(b) or *Flaherty* do not exist in this appeal.

DISPOSITION

We affirm the judgment. Defendants are awarded costs but not attorney fees on appeal.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

SPENCER, P. J.

MALLANO, J.

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)